

**STATEMENT OF PAUL M. HOMAN**  
**FORMER SPECIAL TRUSTEE FOR AMERICAN INDIANS**

**MARCH 3,1999**

**Summary**

On September 19, 1995 I was appointed Special Trustee for American Indians and served in that capacity until January 7, 1999 when I resigned rather than accept the reorganization of the Office of the Special Trustee (OST) set forth in Secretarial Order 3208 dated January 5, 1999. Secretarial Order 3208 is a public document, is self-explanatory and was taken along with supporting actions by the Secretary of the Interior (Secretary) without any prior knowledge or consent by me.

In my opinion the Secretarial Order on its face usurped the powers, duties and responsibilities vested in the Special Trustee, The Office of the Special Trustee (OST) and the Advisory Board by the American Indian Trust Fund Management Reform Act of 1994 (Reform Act). For all practical purposes the implementation of the Order deprived the Special Trustee, the Office of the Special Trustee and the Advisory Board of the independence and the authority which was intended by the Reform Act. This was the principal reason for my resignation (a full statement in this regard is attached). In short, I felt I was deprived of the authority and the resources, principally managerial resources, necessary to carry out the duties and responsibilities of the Special Trustee and the Office of the Special Trustee.

The Secretarial Order and other Department of the Interior (Department) actions since 1994 relative to trust management reform demonstrate over and over again how easy it is to underfund, under-staff, delay and otherwise frustrate the reforms required by the Reform Act in favor of higher Departmental priorities. The result has been to place the Indian trust management reform efforts in jeopardy. The Reform Act was flawed in one important respect in that it failed to provide the Special Trustee, the Office of the Special Trustee and its Advisory Board with the independence and the authority to carry out the purposes of the Act.

The principal causes of the longstanding trust problems are well known and have resulted in conditions that are unacceptable by any reasonable standards. These conditions continue to do significant harm and damage to American Indian trust beneficiaries. They have also caused permanent damage to the core trust management systems the government uses to manage the Indian lands and monies. These defective systems prevent the government from meeting the fiduciary, accounting and reporting standards required by the American Indian Trust Fund Management Reform Act of 1994 and standards of ordinary prudence applicable to all trustees, public or private.

History has shown that so long as the organization and management of the trust management

activities remain status quo and as long as the trust management activities are mingled with general trust functions and other government programs and activities, it is unlikely that any meaningful reforms will be implemented and unlikely that these activities will receive appropriate allocations of financial and managerial resources sufficient to allow them to be administered according to the high moral obligations and trust and exacting fiduciary standards the United States has undertaken and assumed. Yet, the status quo continues.

In my opinion, the Department of the Interior can no longer be trusted to keep and produce trust records. These are conditions precedent to the proper administration of its trust responsibilities to Indian beneficiaries. In recent weeks a court came to share this view in connection with a class action suit brought by individual Indian beneficiaries. More important, it is a view that has long been shared by many, many Indian trust beneficiaries. Therefore, I believe it is time for Congress to consider alternatives to the Department's future management of the government's Indian trust management activities. Specifically, I recommend that Congress consider establishing an independent agency outside the Department of the Interior to manage the U. S. Government's trust management responsibilities to American Indians and American Indian Tribes for trust resource management, trust funds management and land title and records management. Congress should take special care to ensure that these trust activities are managed according to the most exacting fiduciary standards and moral obligations of the highest responsibility and trust.

### **History and Performance of the Office of the Special Trustee and the Department - 1995 to 1999**

From the inception of OST in September 1995, neither the Special Trustee nor the Office of the Special Trustee had direct authority under the Reform Act of 1994 to initiate reforms or to implement those trust management reforms that were approved following the filing of the Special Trustee's strategic plan in April, 1997. Nor did the Secretary elect to vest the Special Trustee and the OST with the direct authority to implement the reforms except at the Office of Trust Funds Management that has reported to the Special Trustee since February 1996. Instead, the Special Trustee and the OST were limited to oversight of the vast majority of the reform efforts that were to be implemented in the same manner as previous unsuccessful reform efforts, i.e., directly by the Bureau of Indian Affairs (Bureau) and other affected units.

The record of the last three years shows a dramatic difference between the very successful reform results achieved by OST directly at OTFM; the minimal results achieved through oversight of the Bureau's reform efforts; and the negative results achieved through oversight of the Department's record keeping reform efforts.

On July 31, 1998 the Secretary of the Interior approved the High Level Implementation Plan (HLIP) which, in his view, provided the structure through which the Department could accomplish the successful resolution of the many decades-old Indian Trust Funds problems. Of 13 sub projects, OST had direct line responsibility for only 2 sub projects: Individual Indian

Money (IIM) and OST data cleanup and the trust funds accounting system (TFAS) used for both IIM and tribal accounts. OST had started planning for these two tasks in 1996 and was able to begin implementation in 1996 and 1997 despite the limited managerial and financial resources which were made available by the Department. When Congress approved significant funding for 1998, OST and OTFM were able to show excellent results as reflected by the HLIP progress report dated December 1998, the last to be released to the public.

The report shows that to date, OST had collected better than 70% of the records to be cleaned, thanks in large part to the overwhelming support of the tribes. There were only three tribal protests (less than one percent of the tribes affected) and all but one was in the process of being resolved when I left the OST. The records of eight of twelve areas had been cleaned through August 1998; two more were scheduled for cleaning by the end of January 1999 and the final two were to be cleaned by June 1999. A very efficient, controlled and centralized cleanup and record keeping process had been designed and implemented by OST to clean and account for 100% of the IIM jacket files. The results so far show the Bureau's record keeping being in even worse condition than previously estimated. As of the December report OST had processed 181,754 active IIM jacket files (22,946 ahead of schedule) and with nearly no disruption to current operations or to Indian beneficiaries and no known loss of records. Unfortunately for the Indian beneficiaries, 15,893 accounts had no documents; 65% (118,631 accounts) were missing mandatory documents required by regulation or policy; and over 41,000 were affected by changes in vital statistics such as no current address. OST is actively working the files to correct as many of these historical deficiencies as possible, a task which has been long neglected by the Bureau and the Department.

The implementation of the trust funds accounting system by OST is also showing outstanding success. After being held up by the Department for over a year, OST in 1998 obtained all necessary approvals, awarded a TFAS contract, conducted a successful pilot and through August had implemented the system successfully in three areas. All areas, including OMNI tribal, are on schedule to be implemented by December 1999, six months ahead of schedule.

The same December 1998 HLIP report showed that seven sub projects that were to be implemented principally by the Bureau of Indian Affairs had no definitive plans for implementation. No significant cleanup processes had been developed or were under way. Moreover, systems design and implementation of asset management and ownership systems plans were lagging. The Bureau's record to date in this reform effort mirrors its historical failures to manage and implement meaningful reform. Once again there is now a high risk of failure or significant delay of reforms assigned to the Bureau of Indian Affairs. Concerns over the BIA's data cleanup and systems efforts were relayed in writing to the Secretary by OST in July 1998 and for this reason the Special Trustee did not recommend approval of the Bureau's part of the HLIP. The Bureau's performance to date will almost certainly jeopardize the Department's commitment to complete the reform effort by the end of fiscal year 2000.

An even larger threat to the overall reform effort is the Department's continued inability or unwillingness to address the fundamental trust record keeping problems and systems which account for the vast majority of the Indian trust management problems. For this reason the

Special Trustee and OST, in their oversight capacity, have since 1996 presented several comprehensive plans to bring the Department's trust account records management function up to the standards that would govern a commercial trustee. None of these efforts were accepted and the HLIP gave no definitive guidance on the issue. For this reason the Special Trustee noted to the Secretary on July 31, 1998:

Since a joint Indian trust records management solution is fundamental to the successful implementation of the other Sub-Projects of the high level implementation plan and since all affected Bureaus have not yet agreed on a solution, the high level implementation plan being presented for surname and your approval will not in my opinion enable the Department to comply with the Reform Act and the Secretary's Agreement dated August 22, 1997.

The Secretarial Order purports to deal with the record keeping issue, but to my knowledge there is still no records retention policy which meets the common law trust standards, a condition precedent for any adequate trust records management system. Nor is there a records management system to retain trust documents, keep records and furnish information, sufficient to provide an accounting to the beneficiaries or to meet the accounting, accuracy and reporting requirements of the Reform Act of 1994. Furthermore, the Secretarial Order also created within OST, a new Office of Trust Litigation Support and Records. This office is now responsible and accountable for Indian trust records management, and for providing accounting, reconciliation, research, settlement and litigation support related to the management of Indian trust assets, all without the authority to carry out those duties and responsibilities. A Grade 15 career civil servant with no previous trust management experience was hired to manage the new office. This scheme on its face has little chance for success and was recently rejected by a court (see below) as a solution to litigation support document production.

The Department's failure to address and resolve the trust record keeping problems jeopardizes the entire reform effort. Without the accurate records required by the Reform Act and common law standards, systems improvements planned for trust fund accounting, asset management and land title and records will be ineffective and will not permit the Department to comply with the accounting, reporting and accuracy standards required by the Reform Act of 1994.

In recent weeks the Department has been criticized and sanctioned for ongoing mismanagement and neglect of the Indian trust records. The Secretary and the Assistant Secretary in charge of the Bureau of Indian Affairs were held in civil contempt of an U. S. District Court's document production orders. The case underlying the contempt proceeding is essentially a trust administration action in which the Indian beneficiaries seek an accounting. The court has not to this point in the case addressed the detailed statutory and common law trust duties owed by the government as trustee to the individual Indian beneficiaries. Nonetheless, the court noted "it is basic hornbook law that the trustee has the duties of retaining trust documents, keeping records, furnishing information to the beneficiary, and providing an accounting." The court further noted: "the court will appoint a special master to oversee discovery, document production, and related matters and to effectuate compliance with this court's orders. The defendants simply cannot be trusted to do this job themselves." When the Department of the Interior can no longer be trusted

to keep and produce trust records which are conditions precedent to the proper administration of its trust responsibilities to Indian beneficiaries, it is time to consider alternatives to the Department's future management of these important trust activities.

The recent record of the Department and the Bureau of Indian Affairs in planning and implementing trust management reform is only the most recent demonstration of their historical failures to bring about meaningful trust management reform. The Reform Act of 1994 called for a Special Trustee and an OST to oversee the reform effort but with no direct authority to ensure that the purposes of the Act were carried out. The Act was flawed in that respect. Despite aggressive oversight activities by the Special Trustee and OST over the last three years, the oversight efforts proved largely ineffective in ensuring that the Department complied with the Act. Nonetheless, the success of OST and OTFM in cleaning up the IIM records and in implementing a new trust funds accounting system demonstrated that significant reform is possible when an office has the responsibility, the authority, the independence and the financial and managerial resources to carry out the reform.

## **Conclusion and Possible Solutions**

As Special Trustee, I filed a strategic plan required by the Reform Act of 1994 with the Congress in 1997. I wish to reaffirm a few points I made in testimony at the time as I believe, with a few exceptions, problems with the trust management systems and the prospects for reform are much the same today as they were then.

I noted then that problems in the trust management systems are longstanding ones. Mismanagement and neglect have allowed the trust management systems, record keeping systems and risk management systems to deteriorate over a 20 to 30 year period and become obsolete and ineffective. For many of those years, including many years since 1990, the trust programs were seriously under staffed and under funded. The result was that the government increasingly was unable to keep pace with the rapid changes and improvements in technology, trust systems and prudential best practices taking place in the private sector trust industry. This gap continues today and will continue to increase until the reforms outlined in the Strategic Plan are funded and implemented. To this day, that gap has not been closed and the prospects for a timely solution are not very good.

There are three principal causes of the mismanagement and neglect that have contributed to the trust management problems both currently and in the past:

1. The primary cause of the trust management problems both historically and currently can be attributed to the trade-offs of financial and managerial resources which take place at every level of government between trust management activities (trust resource management, trust funds management and land title and records management) and other activities and programs of the Bureau of Indian Affairs, the Department of the Interior, the

Administration and the Congress. History has consistently shown these politically expedient government trade-offs of competing financial and managerial resources to be adverse and detrimental to the effective and proper administration and funding of the trust management activities.

These trade-offs have been made and are continuing to be made even in the face of a long history of court cases, which have consistently held the trust relationship between the United States and the American Indians to be a distinctive one. Decisions of the Supreme Court reviewing the legality of administrative conduct in managing Indian property have held officials of the United States to "moral obligations of the highest responsibility and trust" and "the most exacting fiduciary standards," and "bound by every moral and equitable consideration to discharge its trust with good faith and fairness."

2. Another important cause of the trust management problems is the way the BIA is organized and manages trust management activities. The BIA's organizational alignment causes decision-making and management for Individual Indian Money (IIM) and Tribal issues to be an intricate and complex coordination process and an ineffective one at times.

3. The two causes just described acting together over many years have resulted in a third causal factor for the longstanding trust management problems: lack of competent managerial resources to manage effectively and efficiently the trust management responsibilities to the American Indians. Managers and staff of the BIA have virtually no effective knowledge or practical experience with the type of trust management policies, procedures, systems and best practices which are so effective, efficient and prevalent in private sector trust departments and companies. The BIA area and field office managers do not have the background, the training, the experience, and the financial and trust qualifications and skills, necessary to manage the Federal Government's trust management activities according to the exacting fiduciary standards required in today's modern trust environment. Thus, and through no fault of their own, and even assuming adequate financial resources were made available, they are not capable of managing effectively and efficiently the Federal Government's trust management activities on a par with that provided by private sector institutions to their trust customers.

The lack of trust managerial competence and the lack of financial trust orientation and focus throughout the BIA and the Department of the Interior have been institutionalized over many years and are now inherent in the BIA organizational culture. It is the reason in large part:

A. Why the BIA has never originated meaningful reforms of the trust management processes in the last 25 years.

B. Why the BIA has resisted and ultimately failed to implement nearly all of the meaningful reform efforts attempted in the last 25 years.

C. Why a new organizational structure, new management and massive re-training are necessary for the future management of the Federal Government's trust responsibilities to American Indians and the management of the implementation of the reforms identified in the Reform Act of 1994

The principal causes of the longstanding trust problems have resulted in conditions that are unacceptable by any reasonable standards and continue to do significant harm and damage to American Indian trust beneficiaries. They have also caused permanent damage to the core trust management systems the government uses to manage the Indian lands and monies. These defective systems prevent the government from meeting the fiduciary, accounting and reporting standards required by the American Indian Trust Fund Management Reform Act of 1994 and standards of ordinary prudence applicable to all trustees, public or private.

So long as the organization and management of the trust management activities remain status quo and as long as the trust management activities are mingled with general trust functions and other government programs and activities, it is unlikely that any meaningful reforms will be implemented and unlikely that these activities will receive appropriate allocations of financial and managerial resources sufficient to allow them to be administered according to the high moral obligations and trust and exacting fiduciary standards the United States has undertaken and assumed. Yet the status quo continues.

When the Department of the Interior can no longer be trusted to keep and produce trust records which are conditions precedent to the proper administration of its trust responsibilities to Indian beneficiaries, it is time to consider alternatives to the Department's future management of these important trust activities. For this reason and for the reasons stated above, I recommended in 1997 and recommend now that Congress consider establishing an agency to manage the U. S. Government's trust management responsibilities to American Indians and American Indian Tribes for trust resource management, trust funds management and land title and records management according to the most exacting fiduciary standards and moral obligations of the highest responsibility and trust.

Such an agency should have a structure similar to the independent Federal Reserve Board of Governors or the Federal Deposit Insurance Corporation. It should have a board of trustees (ideally, with Indian trust beneficiary representation) appointed by the President and confirmed by the Senate and be subject to the oversight of the Congress and the appropriations process. It should be vested with the responsibility, the authority, the independence and the financial and managerial resources to carry out the purposes of the Reform Act of 1994 and manage the government's ongoing trust management responsibilities to the American Indians. It should be accountable to the American Indian trust beneficiaries and the American public for these trust activities.

**ATTACHED STATEMENT OF PAUL M. HOMAN  
FORMER SPECIAL TRUSTEE FOR AMERICAN INDIANS  
MARCH 3,1999**

On September 19, 1995 I was appointed Special Trustee for American Indians and served in that capacity until January 7, 1999.

On January 5, 1999 the Secretary of the Interior issued Secretarial Order 3208 which became effective on that date. This action is a public document, is self-explanatory and was taken along with supporting actions by the Secretary without any prior knowledge or consent by me.

The Secretary asked me to accept his judgment in the matter. After a great deal of reflection, I reluctantly decided that I could not do so. I therefore resigned, effective January 7, based on the following reasons:

The Secretarial Order on its face usurped the powers, duties and responsibilities vested in the Special Trustee, The Office of the Special Trustee and the Advisory Board by the American Indian Trust Fund Management Reform Act of 1994. For all practical purposes the implementation of the Order deprived the Special Trustee, the Office of the Special Trustee and the Advisory Board of the independence which was intended by the Reform Act of 1994.

The Secretarial Order deprived the Special Trustee of the managerial resources necessary to carry out the duties and responsibilities of that office by substantially changing the duties, responsibilities and/or reporting responsibilities of each of the four OST senior executives who had previously reported directly to the Special Trustee. The implementation of the Order also replaced an experienced and competent Indian manager with a new non-Indian manager with no experience in Indian trust records management.

The Secretarial Order created within the Office of the Special Trustee, a new Office of Trust Litigation Support and Records responsible and accountable for Indian trust records management, and for providing accounting, reconciliation, research, settlement and litigation support related to the management of Indian trust assets, all without the authority to carry out those duties and responsibilities.

The Secretarial Order transferred OST's longstanding Indian trust records manager to duties outside OST and relieved OST's Deputy Special Trustee for Policy of the responsibility for over-seeing trust records management, replacing these skilled, competent and experienced trust managers with a new Director reporting to a newly created Principal Deputy. While the new Director appears to be a competent professional manager, he has no experience in Indian trust records management or in providing accounting, reconciliation, research, settlement and litigation support to the management of Indian trust assets.



Finally, the Secretarial Order was based allegedly on the reason stated by the Secretary that "...the Office of Special Trustee records production has been most problematical and constitutes a serious shortcoming at this point in time.", a view which is not supported by the facts or the record of the Office of the Special Trustee.

These were the principal reasons for my resignation. In short, I felt I was deprived of the authority and the resources, principally managerial resources, necessary to carry out the duties and responsibilities of the Special Trustee and the Office of the Special Trustee.